Filed 1/14/13 DeSiqueira v. Toyota Motor Ins. Co. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WEBER DeSIQUEIRA, Plaintiff and Appellant, v. TOYOTA MOTOR INSURANCE SERVICES, INC., Defendant and Respondent.	B237534 (Los Angeles County Super. Ct. No. BC413643)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Dismissed.

Hodges and Associates, A Clifton Hodges; Kostas Law Firm, James S. Kostas for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Sascha Henry, Peter S. Hecker, Anna S. McLean, Lai L. Yip for Defendant and Respondent.

Weber DeSiqueira appeals from a trial court order staying his lawsuit and ordering contractual arbitration. The order compelling arbitration is not appealable. Further, it was not the "death knell" of DeSiqueira's case because it is neither impossible nor impracticable for him to proceed with his individual claims. Finally, there are no exceptional circumstances warranting treatment of the appeal as a writ of mandate. Accordingly, we dismiss the appeal for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY[1]

DeSiqueira purchased a Toyota that has a new vehicle warranty covering repairs and defects for three years or 36,000 miles, whichever occurs first. He also purchased a "Toyota Extra Care Vehicle Service Agreement" (the Contract), an extended service contract administered by respondent Toyota Motor Insurance Services, Inc. (Toyota). DeSiqueira paid $1,145 for seven years of service or 75,000 miles, whichever occurs first. The warranty and the Contract run concurrently, so long as the warranty is in effect.

The Contract contains an arbitration clause subjecting any claims arising from the Contract to arbitration under the Federal Arbitration Act, including claims in contract, tort, pursuant to statute, regulation, ordinance, or in equity. The Contract prohibits class actions and class arbitrations.

DeSiqueira filed this class action lawsuit in 2009, alleging that the Contract covers the same items as the warranty, in violation of state law. The trial court sustained Toyota's demurrers without leave to amend and gave judgment to Toyota. On appeal, we wrote that DeSiqueira did not state a claim because "It is undisputed that Toyota's service contract covers costs not covered by the manufacturer's warranty." At DeSiqueira's request, we authorized an amendment to allege that Toyota's misrepresentations or false advertising induced him to enter the Contract.

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1 The is the second appeal in this case. The prior appeal is *DeSiqueira v. Toyota Motor Insurance Services, Inc.*, B223261, filed Feb. 7, 2011 (nonpub opn.).

After remittitur issued in 2011, Toyota sent plaintiff a letter demanding arbitration, relying on a recent Supreme Court decision, *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ [131 S.Ct. 1740], which addresses class action waiver clauses. DeSiqueira did not respond to the arbitration demand. Instead, he filed an amended pleading asserting class claims for unfair competition and deceptive representations made in connection with the sale of services. (Bus. & Prof. Code, §§ 17200, 17500; Civ. Code, § 1750, et seq.) DeSiqueira alleges that Toyota's marketing and advertising causes service contract purchasers to think they are receiving seven years/75,000 miles of repair coverage beyond the warranty when in fact they receive only a few years more than the warranty.

Toyota moved to compel arbitration. DeSiqueira asked the trial court to find the arbitration clause unconscionable or unenforceable. The court found that DeSiqueira agreed to arbitrate when he entered the Contract, and the arbitration clause encompasses all of his claims. The court ordered DeSiqueira to submit to arbitration, and stayed his lawsuit pending completion of the arbitration. DeSiqueira appeals.

DISCUSSION

Toyota challenges appellate jurisdiction because DeSiqueira has appealed from an intermediate order compelling arbitration. Under the "one final judgment" rule, an order compelling arbitration is not appealable. (*State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506.) An appeal is permissible when judgment is entered following arbitration. (*Ibid.*; Code Civ. Proc., § 1294, subd. (d).)

DeSiqueira contends that the "death knell" doctrine applies here. He reasons that the trial court effectively terminated his class claims, making that portion of the order immediately appealable. Toyota counters that the death knell doctrine only applies when it is impossible or impracticable for plaintiff's case to proceed as an individual action, and DeSiqueira made no showing that he cannot proceed with individual arbitration.

The death knell doctrine applies when "an order terminates class claims, but individual claims persist." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 762.) It requires (1) a de facto final judgment for absent class members and (2) circumstances indicating that "any appeal likely would be foreclosed" because no final judgment is apt

to be entered on plaintiff's individual claims. (*Id.* at p. 757-759.) The Supreme Court has "repeatedly reaffirmed that an order that denies class certification or otherwise extinguishes class claims in their entirety is appealable, but only in cases in which individual claims survived." (*Id.* at pp. 761-762.)

The trial court stayed—but did not dismiss—DeSiqueira's class claims. If the court stays class litigation while ordering the plaintiff to arbitrate, the order is not appealable because it is not tantamount to dismissal and does not terminate the class claims. (*Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 19.) Nevertheless, the parties agree that the order in this case amounts to a dismissal DeSiqueira's class claims, leaving only his individual claims.

There remains the question whether the second part of *Baycol* is satisfied. That question measures the probability that "any appeal likely would be foreclosed" because of a risk that no final judgment will be entered on DeSiqueira's individual claims. The death knell doctrine only applies "when it is unlikely the case will proceed as an individual action." (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098. But compare *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288, which does not discuss the second part of the death knell doctrine.)

"Here, [appellant] fails to explain or demonstrate how the trial court's order makes it impossible or impracticable for [him] to proceed with the action at all." (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1123.) On the contrary, DeSiqueira suggests that his possible recovery of $1,145 "coupled with the right to recover attorney's fees and costs," increases the likelihood he will proceed with individual claims. Because DeSiqueira does not argue that it is impossible or impracticable to proceed with his claims, the death knell doctrine does not apply.

DeSiqueira asks this Court to treat his appeal from the order compelling arbitration as an extraordinary writ. "In exceptional situations, a party aggrieved by an order compelling arbitration may seek appellate review of the order by a petition for writ of mandate." (*State Farm Fire & Casualty v. Hardin*, *supra*, 211 Cal.App.3d at p. 507.) "Though we [ ] have power to treat the purported appeal as a petition for writ of mandate,

we should not exercise that power except under unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.) With respect to arbitration clauses, "the underlying policy [is] to encourage parties to arbitrate first and litigate, if necessary, later." (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 408.)

DeSiqueira has made no showing of exceptional or unusual circumstances. Multiple cases are pending before the state Supreme Court involving the issue presented in this appeal, i.e., the effect on state law of the federal decision in *Concepcion.* A premature ruling in favor of DeSiqueira could lead to lengthy, costly and ultimately futile discovery on the class claims. Under the circumstances, it is prudent to conserve resources and allow DeSiqueira to proceed to arbitration on his individual claims while awaiting a definitive ruling from above. The parties may even elect to defer their arbitration until the Supreme Court provides guidance.

The viability of DeSiqueira's class claims will not evade review. After his individual claims are arbitrated and a judgment is obtained, plaintiff is entitled to review of the trial court's interim rulings. (Code Civ. Proc., § 906; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649; *Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1359; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1229; *State Farm Fire & Casualty v. Hardin*, *supra*, 211 Cal.App.3d at p. 506; *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353.)

DISPOSITION

The appeal is dismissed. Parties to bear their own costs and attorney fees on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J. ASHMANN-GERST, J.